

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 540/2004

Mrs. Ivy Muriel Fonseca, major of age,
resident of 'Radiant Park' 968,
Nana Peth, Pune - 2.

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Petitioner.

V/s.

Mr. Porus Adi Dotor,
major of age, son of Adi H. Docor,
Resident of 'Perin Villa',
B.B. Borkar Road,
Alto Porvorim, Bardez, Goa.

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Respondent.

Mr. S.D. Lotlikar, Senior Advocate with Mr. R.S. Sardesai, Advocate for
the petitioner.

Mr. Anthony D'Silva, Advocate for the respondent.

CORAM : A.P. LAVANDE, J.

Date of reserving the Judgment :
14th January, 2005.

Date of pronouncing the Judgment :
20th January, 2005.

J U D G M E N T :

Rule. Mr. D'Silva, learned Counsel for the respondent waives
notice. Heard finally with the consent of learned Counsel for the parties.

2. By this petition, the petitioner challenges the order dated 17.7.2004, passed by the Civil Judge, Sr. Division, 'C' Court at Mapusa in Special Civil Suit No.85/2001/C.

3. The petitioner is the defendant in Special Civil Suit No.85/2001/C filed by the respondent herein and she is the plaintiff in Special Civil Suit No.19/2002/A, filed against the respondent herein. The suit filed by the respondent is for specific performance of the agreement and the suit filed by the petitioner is for recovery of possession on the ground that she has been forcibly dispossessed from the suit property. The suit filed by the present petitioner is under Section 6 of the Specific Relief Act. The petitioner who is the defendant in Special Civil Suit No.85/2001/C filed an application dated 5.2.2004 for amalgamation and joint trial of both the suits. The respondent by reply dated 20.2.2004 opposed the prayer and by the impugned order dated 17.7.2004, the trial Court dismissed the application filed by the petitioner. After hearing both the sides, the learned trial Judge has passed the impugned order holding that there is no case made out for granting the relief prayed for by the petitioner. The trial Court has held that if the two suits are amalgamated, the same would cause lot of inconvenience to both the parties, since the issues are different in both the suit although the facts are more or less the same. The trial Court has also rejected the prayer on the ground that Special Civil Suit No.

85/2001/C has been directed to be disposed of within a time frame and, therefore, it would not be proper to amalgamate both the suits and, therefore, both the suits should be tried independently.

4. Mr. Lotlikar, learned Senior Counsel appearing for the petitioner has submitted that admittedly the parties in both the suits are the same, and that the plaintiff in the first suit is the defendant in the second suit and the defendant in the first suit is the plaintiff in the second suit. He further submitted that although the suit filed by the petitioner is under Section 6 of the Specific Relief Act, the same would not make any difference if the joint trial is held. He further submitted that a joint trial would only save the time of the Court and no prejudice would be caused to either party if the two suits are amalgamated and tried together. The learned Senior Counsel further submitted that the reasons given by the trial Court for dismissing the application are absolutely untenable in law and that the trial Court has exercised the jurisdiction illegally in dismissing the application. He further submitted that the impugned order discloses error of law apparent on the face of the record. He, therefore, submits that the impugned order deserves to be quashed and set aside and this is a fit case in which both the suits ought to be amalgamated and tried together and a common judgment and decree ought to be passed by the trial Court. Mr. D'Silva, learned Advocate appearing for the respondent submits that the trial Court has exercised

the jurisdiction properly. He further submitted that the jurisdiction of this Court to interfere with the impugned order in exercise of writ jurisdiction is very limited and the impugned order by, no stretch of imagination, could be termed as contrary to law. The learned Counsel further submitted that since the Special Civil Suit No.85/2001 has to be disposed of before end of March, 2005, the amalgamation of two suits would only cause prejudice to the respondent herein and it would not be possible for the trial Court to comply with the directions of this Court.

5. I have perused the records. I have also considered the submissions made by the learned Counsel appearing for the parties. Admittedly, the two suits filed are between the same parties and the subject-matter of the suit is the same. The first suit filed by the respondent is for specific performance of the agreement and the second suit filed by the petitioner herein is for mesne profits. This being the position, the point for consideration is whether it would be in the interest of justice to permit the parties to lead evidence in the two suits separately or there should be a joint trial in respect of the two suits. At this stage, it is pertinent to note that in an earlier order dated 9.1.2004 passed by this Court, in Writ Petition No.642/2003, filed by the present petitioner against the order of the District Judge, refusing to transfer both the suits to one Court, this Court in paragraph 2 of the said order has observed thus :

“ 2. Having heard the learned Advocates for the parties, I am of the view that no prejudice would be caused if both the suits are heard by one trial Judge. In fact, it would probably minimize the evidence which may be recorded. Whether the suits are to be amalgamated or not, would be considered by the trial Court once the suits are assigned to one Judge. Whether the evidence should be treated as common evidence also can be considered by the trial Judge.”

In fact, from the perusal of the above order, it is evident that this Court has observed that if both the suits are tried by one Judge, it would probably minimize the evidence which may be recorded. No doubt, whether the suits are to be amalgamated or not, was left to the discretion of the trial Court, after the suits were assigned to one Judge and the trial Court was permitted to consider whether common evidence should be permitted to be led by the parties.

6. As stated above, the parties in the two suits are the same, the property is the same, but the reliefs claimed by two parties in the two suits are obviously different. In the event the two suits are permitted to be tried separately, the same would only take time of the Court, since the witnesses in both suits will have to be examined in each of the suits, separately. In so far as the argument advanced by the learned Counsel appearing for the respondent that prejudice would be caused to the respondent if the two suits are tried together, I am unable to accept the submission of the learned Counsel for the respondent.

Although the issue in the second suit filed by the petitioner is whether the petitioner was illegally dispossessed within six months of filing of the suit, it cannot not be said that the issues involved in the two suits are absolutely unconnected and, therefore, prejudice would be caused by a joint trial. In order to save valuable time of the Court, it would be just and proper if the joint trial is held in the two suits. In my opinion, no prejudice would be caused to the respondent if common evidence is allowed to be led and that the respondent would be at liberty to cross examine the witnesses examined by the petitioner herein. Although I am of the opinion that a joint trial is to be held, however, I am unable to accept the submission of the learned Counsel for the petitioner that both the suits ought to be tried together and a common Judgment and Decree ought to be passed by the trial Court. It is pertinent to note that the suit filed by the petitioner herein is under Section 6 of the Specific Relief Act; whereas, the suit filed by the respondent is for specific performance of the agreement. Remedy of revision is available against judgment passed under Section 6 of the Specific Relief Act. But, in so far as the suit filed by the respondent is concerned, the remedy is obviously by way of an appeal against the Judgment and Decree. Therefore, it would be just and proper if the trial Court is directed to permit the parties to lead common evidence in both the suits and pass separate judgments and decrees. In other words, the evidence of the respondent herein recorded in the Special Civil Suit No.85/2001/C has

to be treated as evidence of the plaintiff in Special Civil Suit No.19/2002/A and as evidence of the defendant in Special Civil Suit No.19/2002/A and the evidence led by the petitioner herein has to be treated as evidence led by defendant in Special Civil Suit No.85/2001/C and the evidence led by the plaintiff in Special Civil Suit No.19/2002. After considering the evidence led by the parties, it would be appropriate to direct the trial Court to pass separate Judgments and Decrees, in view of the fact that the remedies provided against the final decrees are different. Such an order would serve the interest of justice and would not cause any prejudice to either party.

7. In the result, therefore, the petition is allowed partly. The trial Court is directed to permit both the parties to lead common evidence in both the suits and after considering the evidence led by the parties, as stated above, to pass separate Judgments and Decrees in the two suits. Rule made absolute in the aforesaid terms. The parties are directed to bear their own costs.

A.P. LAVANDE, J.

ssm